In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-306

HUMBERTO TOBAR, JUAN RAUL LOPEZ & VINCENTE COLON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted on one count of an indictment charging the concealment and transportation of imported cocaine, in violation of 21 U.S.C. 173, 174. They were acquitted on a second count, charging the knowing importation of the cocaine. Petitioners Tobar and Colon were each sentenced to seven and one-

half years' imprisonment, and petitioner Lopez to ten years' imprisonment (T. 848).[1] The court of appeals affirmed *per curiam* (Pet. App. A.).

The evidence showed that during the early morning hours of May 27, 1970, federal agents, pursuant to an informer's tip that a Columbian ship was carrying cocaine into this country, were maintaining a surveillance of the vessel at a Brooklyn pier where it had recently docked. Petitioner Lopez was seen, empty-handed, approaching the bow of the ship, behind which he disappeared. After a brief time he reappeared carrying a blue plastic bag. He made his way back to the street area where he joined two men—later identified as petitioners Tobar and Colon—in a waiting vehicle. The car sped away from the pier, followed by the federal agents. After a high speed pursuit, the car crashed into a parked automobile and the blue plastic bag was hurled from petitioners' vehicle. Lopez and Tobar attempted to flee on foot, but were apprehended; Colon remained behind and also was arrested at the scene of the collision. (T. 320, 322, 324-326, 334, 393, 396-399.)

The bag was retrieved (T. 327-328), and upon examination was found to contain five kilograms of cocaine, 98.9% pure, segregated into packages, and with a wholesale value of $50,000 (T. 332, 377, 400). Columbia is a major source of supply for imported cocaine (T. 644-645).

Both sides proffered evidence concerning the origin of the cocaine. A government chemist testified that

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[1] "T." refers to the five-volume trial transcript which we are lodging with the Clerk of this Court.

some cocaine is manufactured in the United States (T. 378-379). At the instigation of the defense, the trial judge judicially noticed statistics about lawfully-produced domestic cocaine and allowed defense counsel to read those statistics to the jury (T. 379). The judge also informed the jury of other statistics: that during the period 1959 to 1968, the total thefts per year of domestic cocaine had averaged slightly over four kilograms; and that it would be unlikely that a drug store would stock more than one ounce or a hospital more than four ounces of that drug.[2] The court told the jury that it could consider all these figures in determining whether the large quantity of cocaine involved here was acquired by thefts from legitimate domestic sources and thus was not unlawfully imported (T. 383-384). Defense counsel objected to the court's figures and comments, but did not respond to the judge's suggestion that they could introduce additional evidence on this matter (T. 384).[3]

Each petitioner testified and denied any possession of the cocaine (T. 525, 555, 577). In essence, their defense was "wrong identification"—that in the darkness of the night, the agents had chased down the

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[2] The statistics read by defense counsel were from this Court's opinion in *Turner* v. *United States*, 396 U.S. 398, 418-419, notes 36 and 37. The trial judge's statistics were from a recent Second Circuit opinion, *United States* v. *Gonzalez*, Nos. 33618, 33624, 33625, decided May 14, 1971, petition for a writ of certiorari pending, No. 70-5342.

[3] Thus the reliability of the statistics was subject to an adversarial proceeding during the trial, contrary to petitioners' assertion (Pet. 10).

wrong vehicle and arrested the wrong people (see T. 219, 554, 577, 697, 752, 754).

The trial judge instructed the jury that the statistics read to them were designed for background purposes and were not binding; and that if the jury found that the cocaine had been manufactured in the United States, no federal crime had been committed (T. 796). The judge also instructed that it was necessary for the government to prove that the cocaine was of foreign origin and that petitioners knew of such origin, but that such knowledge could be inferred from petitioners' possession, if any, of the drug, their conduct, if any, in relation to the drug, and all the other facts and circumstances in the case (T. 802). Defense counsel did not object to these final instructions (T. 690, 804).

Here, as in the court below, petitioners contend that the trial judge improperly permitted the jury to infer from the statistics introduced that the cocaine was of foreign origin and that they knew of such origin (Pet. 10). On the contrary, as the court of appeals noted, the trial judge "did not charge the inference permitted by 21 U.S.C. § 174 as such" (Pet. App. A, p. 15). The judge instructed the jury that the government must prove that the cocaine was illegally imported and that petitioners knew that; and that the jury could take the fact of possession, along with all the other evidence, into account in determining whether petitioners had such knowledge. The evidence summarized above provided ample support for the jury's conclusion that the statutory elements were satisfied and shows, as well, that the

statistical information—initially brought into the case by petitioners—was extraneous to the jury's considerations in the circumstances here.

Petitioners' testimony denying possession of the cocaine made the statistical information even less relevant. Petitioners never claimed that the cocaine had been acquired by them from domestic sources and did not deny its foreign origin. Instead, they denied that they ever possessed it. Indeed, in argument, defense counsel stated: "If they had the bag in the car, they're guilty. That's how simple this whole case is" (T. 717).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

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[4] In *Turner* v. *United States*, 396 U.S. 398, 419 n. 39, where less than one ounce of cocaine was involved, this Court deferred consideration of the propriety of the statutory inference where large quantities of cocaine are involved. In the present case that issue is not raised since no instruction was given as to the statutory inference.

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